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No. 06-1319

Supreme Court, U.S.
FILED
MAY 3 - 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

CAROLINE ANNE NEWCOMB, A MINOR, BY AND THROUGH HER NEXT FRIEND AND NATURAL FATHER, THOMAS W. NEWCOMB,

Petitioners,

v.

JAMES R. BAIR, M.D., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Arizona, Division One

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Arizona Court of Appeals properly affirmed denial of petitioner's motion to vacate judgments under Rule 60(c)(6), Ariz. R. Civ. P., where the minor Petitioner was, at all relevant times, represented by counsel and by her father as guardian.

PARTIES TO THE PROCEEDING

Petitioners are Caroline Anne Newcomb, a minor by and through her next friend and natural father, Thomas W. Newcomb. The Petitioners were Movants in the Superior Court of Arizona, Maricopa County under Rule 60(c)(6), Ariz. R. Civ. P. They were Appellants in the Arizona Court of Appeals, Division One, Department E; and Petitioners for review in the Supreme Court of Arizona.

Respondents participating in this Response are: Scottsdale Medical Imaging, Ltd.; J.K. Crowe, M.D.; Sharon Lynn Karayianis, M.D., Scottsdale Pathology Associates, Ltd., an Arizona corporation. The remaining Respondents, not participating in this Response, are: James R. Bair, M.D.; James R. Bair, M.D., P.C.; Scottsdale Memorial Hospital-Osborn, an Arizona corporation; Scottsdale Memorial Health Services, Co., Inc., an Arizona corporation; Scottsdale Memorial Hospitals, an Arizona corporation; Scottsdale Memorial Health Systems, Inc., an Arizona company; B.E. Medley, M.D.; Jude Finney, M.D., and Healthcare, P.C.

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STATEMENT OF THE CASE

A. Essential Facts.

This litigation began more than fourteen years ago. It arises out of the death of Cheryl Newcomb during the birth of her daughter, Caroline, and injuries Caroline sustained upon delivery. Cheryl's husband, Thomas Newcomb, filed a lawsuit in Arizona state court (Maricopa County Superior Court, Cause No. CV 92-22705) on December 31, 1992, on behalf of himself and his minor daughter, Caroline (*"Newcomb I"*). The defendants in *Newcomb I* were Scottsdale Memorial Hospital, now known as Scottsdale Healthcare Corp. ("SMH"), where the delivery occurred, and Dr. James Bair, the obstetrician, and his professional corporation.

Among other things, *Newcomb I* alleged that Dr. Bair should have performed a primary c-section, rather than inducing labor due to Cheryl Newcomb's large uterine fibroid tumors and the risk of placental abruption. The uterine fibroids and the records that reported them were at issue from the commencement of *Newcomb I*. During discovery, petitioners began to contend that SMH and others had fraudulently altered and falsified records to cover up the true cause of Cheryl's death and Caroline's injuries.

In a motion for partial summary judgment filed on April 20, 1995, SMH contended that it was entitled to summary judgment on the fraud allegations because no facts or theories to support a claim of fraud had been disclosed, and there was no evidence of fraud or falsification. That motion also sought an order in limine precluding any argument or comment at trial suggesting falsification or cover up.

Petitioners opposed SMH's motion. Their attorney asserted that he had just learned for the first time (when he received the medical examiner's records from SMH on April 19, 1995) that Cheryl may have had a placenta previa that caused her death and injury to her daughter. As early as May 10, 1995, he also told the trial court that Petitioners "will be filing in the near future a Motion for leave to file an amended complaint to reflect the presence of a placenta previa, to reopen discovery, **and to state a now-appropriate claim for fraud.**" Petitioners also relied on an affidavit from one of their experts, explaining why the recently-discovered evidence suggesting the existence of placenta previa altered his prior opinions.

In a further effort to oppose SMH's motion, Petitioners filed, on June 14, 1995, a supplemental affidavit by their expert. The expert declared that on June 8, 1995, he had looked at the actual ultrasounds for Cheryl Newcomb for the first time, and that they showed a large fibroid tumor and the placenta located in the lower uterine segment. He further declared that he had only recently become aware that a placenta previa had been observed at the time of the c-section and that he had no reason to look at the ultrasounds before that time.

By minute entry dated August 1, 1995, the trial court denied SMH's motion for partial summary judgment and motion in limine related to the issue of fraud. However, the trial court granted summary judgment for SMH on the ground that Petitioners had failed to produce sufficient expert opinion evidence to support their claims.

The claims against Dr. Bair proceeded to trial. However, at the conclusion of Petitioners' evidence, the parties stipulated to the dismissal of claims against Dr. Bair with

prejudice. The trial court later learned that the attorneys for Petitioners at that time had agreed prior to trial with Dr. Bair's attorney to dismiss their claims, but had concealed that agreement from the court.

Petitioners appealed the judgment in favor of SMH in *Newcomb I*. Finding that Petitioners had offered sufficient expert evidence, the appellate court reversed summary judgment and remanded the case against SMH to the trial court.

In the meantime, Petitioners had filed a second lawsuit (Maricopa County Superior Court, Cause No. CV 96-07173) on April 24, 1996 ("*Newcomb II*"). The defendants in *Newcomb II* included SMH and several medical doctors, including Dr. Crowe, Dr. Medley, and Dr. Karayianis. *Newcomb II* included allegations that the defendants had rewritten, altered and otherwise falsified records. Ultimately, the remanded claims against SMH in *Newcomb I* were consolidated with *Newcomb II* on February 5, 1998.

On August 31, 2001, the trial court granted a motion to compel Petitioners to disclose evidence related to their claim that they incurred increased litigation expenses as a result of the alleged fraud, which evidence included documents from their former attorneys' files. Petitioners ignored this order. On January 8, 2002, the trial court issued a second order requiring Petitioners to produce their prior attorneys' files, this time warning that failure to comply by January 22, 2002, would result in dismissal of the case.

Rather than comply with these orders, Petitioners filed a special action appeal with the Arizona Court of Appeals on March 4, 2002. On March 28, 2002, the

appellate court ordered Petitioners to produce their former attorneys' files for *in camera* inspection by the trial court, so that the trial court could determine which documents were relevant to the fraud allegation and order their disclosure. Petitioners never complied with this order either.

In the meantime, on February 1, 2002, the various defendants moved for summary judgment. When Petitioners did not timely respond to these motions, the defendants moved for summary disposition of their pending summary judgment motions.

On March 20, 2002, Petitioners, through their counsel of record, filed untimely responses to just one of the defendants' (Dr. Karayianis') motion for summary judgment and motion for summary disposition. However, they filed no responses to the other pending motions.

On April 10, 2002, the trial court granted the pending summary judgment motions. The trial court entered judgment for Dr. Crowe and Dr. Medley on May 3, 2002, and for SMH and Dr. Karayianis on May 6, 2002. Petitioners, again through counsel of record, appealed these judgments on May 31, 2002, but later abandoned that appeal.

Almost two and a half years later, on November 15, 2004, Petitioners sought relief from these judgments pursuant to Rule 60(c)(6), Ariz. R. Civ. P. Thomas Newcomb admits he learned of the dismissal of his and his daughter's claims in October, 2003; however, Petitioners offered no explanation for waiting more than a year after that discovery to seek relief from the judgment. The trial court denied the motion, and Petitioners appealed to the Arizona Court of Appeals.

B. Proceedings Below.

1. The Arizona Court of Appeals.

After full briefing and oral argument, the Arizona Court of Appeals issued an unpublished decision, affirming the trial court's decision. (A-3 to A-29 of Petitioner's Appendix). That court held that Petitioners were not entitled to relief from the judgment under Rule 60(c)(6), relying on the Arizona Supreme Court's express rejection of the affirmative misconduct rule in *Panzino v. City of Phoenix*, 196 Ariz. 442, 999 P.2d 198 (2000). (A-16 to A-19, ¶¶28-32). It also held that the underlying premise of Petitioners' argument – that they had been abandoned by their counsel and the judgments granting summary judgment had been entered "ex parte" – was false. It specifically noted that Petitioners' counsel of record had filed a special action challenge to the trial court's orders compelling production of their former attorneys' files "[j]ust two weeks before defendants moved for summary judgment," filed a response to one of the defendants' motions for summary judgment and then commenced an appeal after entry of judgment. (A-13, A-14, A-21 to A-23, ¶¶23, 37-39 and n.8).

The Arizona Court of Appeals also rejected the argument that the trial court was required to appoint someone to represent Caroline Newcomb, noting that her father already filled that role as her legal guardian. (A-19 to A-20, ¶¶33-34).

Finally, the Arizona Court of Appeals also rejected Petitioners' fraud-on-the-court argument. (A-24 to A-28, ¶¶41-50). It found that Petitioners' allegations did not constitute "fraud on the court" under Rule 60(c)(6), Ariz. R. Civ. P., because "[t]he fraud alleged does not involve corruption of the judicial process itself, and does not

include bribery or improper influence of the court . . . [and Petitioners] were not prevented from arguing the fraud." Indeed, it noted that Petitioners had repeatedly presented "evidence which they believed showed a fraudulent cover-up by the defendants." (A-25, ¶46).

Petitioners filed a motion for reconsideration with the Arizona Court of Appeals. That motion was denied. (A-33).

2. Arizona Supreme Court.

Petitioners next petitioned for discretionary review with the Arizona Supreme Court. The Arizona Supreme Court denied review. (A-1 to A-2).

REASONS FOR DENYING THE PETITION

Petitioners assert just one argument for granting their petition: the Arizona courts violated the due process rights of a minor, Caroline Newcomb, by not doing something to protect her from abandonment by her counsel. The petition should be denied because: (1) its underlying premise of abandonment by counsel is false; (2) Petitioners' motion for relief from judgment was untimely and therefore could have been properly denied regardless of its merits; and (3) the Petition has no merit because there was no due process violation at all.

I. THE UNDERLYING PREMISE FOR THE PETITION IS FALSE.

The lynchpin of Petitioners' due process argument is that Caroline was abandoned by counsel when motions for summary judgment were filed, and that the resulting

judgments were therefore rendered "ex parte." This is simply false, as both the trial court and the Arizona Court of Appeals recognized, and as the trial court record unambiguously demonstrates.

Petitioners were actively represented by their counsel of record in the days immediately before the summary judgment motions were filed, during the pendency of those motions and even after the resulting judgments were entered. Thus, the Arizona Court of Appeals properly noted:

> [T]he record shows Newcombs' counsel was actively litigating the case at the time the summary judgment motion were filed. Just two weeks before defendants moved for summary judgment, Newcombs had filed a special action challenging the superior court's production ruling and one expert ruling. Newcombs' lawyers pursued the special action and, indeed, won partial relief.

(A-22, ¶37).

As to the motions for summary judgment themselves, the record shows that Petitioners' counsel of record did file a response as to one of the defendants' motions (A-23, ¶39 ("Newcombs' argument that counsel abandoned Daughter is further contradicted by counsel's actions in responding to Karayianis's summary judgment motion and motion for summary dismissal.")). Moreover, the Arizona Court of Appeals correctly observed:

> Why counsel failed to respond to all but one of the summary judgment motions remains a mystery. . . .

> . . . Since counsel had not abandon Daughter on these matters, the superior court might have believed Newcombs' failure to respond to the summary judgment motions [of the other defendants] was tactical, perhaps because they did not have a meritorious response or because the court's production ruling required them to produce documents containing information injurious to their case.

(A-22, ¶¶38-39).

Even after entry of judgment against them, Petitioners continued to be represented by their counsel of record. Their counsel filed a timely notice of appeal. But, for reasons also unexplained, they did nothing further to pursue the appeal. (A-14, ¶23).

Thus, contrary to Petitioners' false assertion to this Court:

> The reality is that Newcombs received actual representation throughout the case, but, for reasons not explained, received grossly deficient legal representation at the very end of the case. But grossly legal representation does not entitle a party to Rule 60(c)(6) relief in Arizona.

(A-22, ¶38). Nor does merely deficient legal representation in this civil action constitute a due process violation. Instead, as the Arizona Supreme Court taught in *Panzino v. City of Phoenix*, 196 Ariz. 442, 447 ¶ 17, 999 P.2d 198, 203 (2000), "[Caroline's] right of action now lies against her former attorney, not against the original defendants."

II. PETITIONERS' RULE 60(c)(6) MOTION WAS UNTIMELY AND COULD HAVE BEEN DENIED ON THAT BASIS.

Petitioners' motion for relief from judgment was required to be filed "within a reasonable time." Rule 60(c), Ariz. R. Civ. P. The final judgments from which Petitioners seek relief were entered in May, 2002. Petitioner did not file their Rule 60(c)(6) motion until November 15, 2004 – two and a half years later. Yet, the only explanation Petitioners offered for this delay is that Petitioners did not learn that the trial court had dismissed the entire lawsuit until October 2003, when Thomas Newcomb admittedly learned of the dismissal. However, Petitioners offered no explanation whatsoever for waiting to seek relief from the judgment for an additional thirteen months.

Under Arizona law with respect to Rule 60(c) motions, "the moving party is 'required to show good reason for his failure to take appropriate action sooner' and should offer 'some explanation of the delay in seeking relief.'" *Hilgeman v. American Mortgage Securities, Inc.*, 196 Ariz. 215, 220 ¶ 16, 994 P.2d 1030, 1035 (Ariz. Ct. App. 2000) (quoting *Marquez v. Rapid Harvest Co.*, 99 Ariz. 363, 365-66, 409 P.2d 285, 287-88 (1965)). Thus, Petitioners' failure to offer any explanation for not seeking relief sooner than thirteen months after they learned of the dismissal is, in itself, sufficient justification for the trial court's denial of the motion.

The Arizona courts did not decide the timeliness issue because Petitioners' motion so clearly did not fit within the parameters of Rule 60(c) on the merits. However, given this additional procedural defect, this Court's review of the merits is unwarranted.

III. THE DENIAL OF PETITIONERS' RULE 60(c) MOTION WAS NOT A DUE PROCESS VIOLATION.

Petitioners contend that the trial court violated Caroline Newcomb's due process rights by not doing something to ensure she had "actual representation." (Petition at 14). Their argument finds no support in either Arizona law or this Court's established due process principles.

Under Arizona law, "a minor is never allowed to bring an action in his own name but must always sue through a representative whatever the cause of action." *Porter v. Triad of Arizona*, 203 Ariz. 230, 233 ¶ 11, 52 P.3d 799, 802 (Ariz. Ct. App. 2002). Thus, the rules of civil procedure provide that when "an infant . . . has a representative, such as a general guardian, or similar fiduciary, the representative may sue or defend on behalf of the infant." Rule 17(g), Ariz. R. Civ. P. If the infant does not have such a representative, "[t]he court shall appoint a guardian ad litem . . . or shall make such other order as it deems proper for the protection of the infant." *Id.*; *see also Montano v. Browning*, 202 Ariz. 544, 547 ¶ 9, 48 P.3d 494, 497 (Ariz. Ct. App. 2002).

Furthermore, like most other jurisdictions, Arizona Courts hold "that a non-attorney parent or like fiduciary must be represented by an attorney to maintain a lawsuit on behalf of a child or incompetent person." *Byers-Watts v. Parker*, 199 Ariz. 466, 470 ¶ 17, 18 P.3d 1265, 1269 (Ariz. Ct. App. 2001). Indeed, Arizona has adopted the federal courts' conclusions and rationales that a trial court has a *sua sponte* duty to ensure a minor is represented by a lawyer because "the infant is always the ward of every court wherein his rights or property are brought into jeopardy." *Id.* at 470 ¶¶ 15, 18, 18 P.3d at 1269 (quoting *Wenger v. Canastota Central School District*, 146 F.3d 123, 125 (2d Cir. 1998), *cert. denied*, 526 U.S. 1025 (1999)).

In this case, the minor Petitioner, Caroline Newcomb, enjoyed both of these levels of protection. First, she was not asserting her claims directly. Instead, her claims were brought on her behalf through her father/guardian, Thomas Newcomb. Second, Thomas Newcomb was not attempting to represent himself and Caroline *pro se*. Instead, he had retained attorneys of his choosing to pursue both his and Caroline's claims.

Although Petitioners contend that the trial court had a duty to do something more to ensure that the minor had "actual representation," they do not define what they mean by "actual" representation. As discussed above, their attorneys of record affirmatively took steps to represent Petitioners immediately before and after the motions for summary judgment were filed. Thus, as a matter of actual fact, Caroline Newcomb was being represented by legal counsel throughout the entirety of the lengthy litigation.

Keeping this in mind, Petitioners' contention that the trial court had a duty to ensure "actual representation" apparently means a duty to monitor and evaluate the performance of counsel of record and *sua sponte* take action when counsel of record fall below "acceptable" standards – whatever that might mean. However, Petitioners cite no Arizona authority in support of such a duty, and, indeed, no such authority exists.

Similarly, Petitioners cite no federal authority for the notion that a minor's right to due process includes the right to reports from trial court judges about the quality of the minor's legal representation. Again, no such authority exists.

The decisions of this Court on which Petitioners rely merely state the familiar standard that the Due Process

Clause of the Fourteenth Amendment requires "notice and opportunity for hearing appropriate to the nature of the case." *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 1712 (2006) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L.Ed. 865 (1950)). Petitioners cite no case that holds (or even hints) that a trial court in civil litigation must go over the heads of a minors' attorneys and verify directly with the minors' guardians that they are aware of, and in agreement with, the attorneys' actions. The Due Process Clause does not mandate such action.

Accordingly, because Caroline Newcomb's claims were asserted in the trial court by her father/guardian and she was represented by counsel retained by her father, she enjoyed the full measure of due process to which she was entitled. Consequently, the petition for writ of certiorari should be denied.

CONCLUSION

For the reasons discussed above, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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